(3)

No. 04-144

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
NORFOLK SOUTHERN RAILWAY CO., AND
NORFOLK SOUTHERN CORPORATION,

Petitioners,

v.

SHIRLEY ANDERSON,

Respondent.

On Petition for a Writ of Certiorari To The Court Of Appeals Of Ohio, Eighth Appellate District, Cuyahoga County

REPLY BRIEF

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REPLY BRIEF

The petition demonstrates that the decision below on the scope of § 5 of the Federal Employers' Liability Act (FELA) contravenes this Court's decisions in *Callen* v. *Pennsylvania Railroad*, 332 U.S. 625 (1948), and *Mellon* v. *Goodyear*, 277 U.S. 335 (1928). Pet. 12-16. It further shows that there is now an acknowledged 2-1 split in the federal courts of appeals, with multiple state appellate courts on both sides of the divide, over whether FELA plaintiffs may settle only an "accrued claim for a known injury," as the court below ruled (Pet. App. 12a). Pet. 16-21. Respondent's distinctions of *Callen* and *Mellon* are unavailing. Those decisions hold that a general release of claims in settlement of litigation is valid under § 5, regardless of whether the full extent of the injury from a tortious act is known at the time, and whether or not the released claim has accrued. Moreover, respondent's denial of the circuit split (which is based on a profound misreading of the cases) founders on the state court's direct acknowledgement of that conflict below. Finally, it defies logic for respondent to claim that the inability of parties to negotiate a comprehensive settlement of asbestos liability – especially, cancer claims (which are not limited to mesothelioma) – will have no effect on the efficient settlement of asbestos cases, which is the only mechanism that in any fashion operates to relieve court dockets that are clogged with asbestos claims. Because "the scope of § 5 is of fundamental importance in the administration of the Federal Employers' Liability Act," *Duncan* v. *Thompson*, 315 U.S. 1, 5 (1942), and because "[a] uniform application" of FELA "throughout the country is essential to effectuate its purposes," *Dice* v. *Akron, Canton & Youngstown Railroad*, 342 U.S. 359, 361 (1952), this Court should grant review to resolve the conflict of authority on this significant and recurring issue of federal law.

1. In *Callen*, this Court held that a general release that compromises a claim does not offend section 5 of FELA, 332 U.S. at 631, and in *Mellon*, this Court held that a valid prior release extinguishes an unaccrued cause of action for wrongful death, 277 U.S. at 345. Respondent's contrary analysis of this Court's precedents is rife with error.

Respondent turns first to *Mellon*, and begins by misstating the holding of that case. Respondent claims that *Mellon* "does not have any application to this case" because it only interpreted section 9 of FELA (45 U.S.C. § 59), which authorizes survival actions. Opp. 6. Respondent says that in *Mellon* the "widow tried to bring a survival action based on the *same injury*" that the decedent (Goodyear) had settled prior to his death, and this Court merely "held that this survival action was barred because the decedent recovered in the personal injury claim for that same injury." *Id.* at 7.

That is wishful thinking. The widow in *Mellon* brought a *different* cause of action that (like respondent's claim here) had not accrued at the time the general release was executed: namely, a wrongful death action under section 1 of FELA, 45 U.S.C. § 51, not a survival action under section 9. Her contention was that "the beneficiaries had a *separate cause of action* for their pecuniary damage which the decedent could not release." 277 U.S. at 337 (emphasis added). This Court, after noting that "[o]bviously" any survival action under section 9 was extinguished by the release, stated that the widow "must recover, if at all, under § 1, Act of 1908, which imposes liability for pecuniary loss sustained by dependents through death." *Id.* at 343.

The Court went on to hold that the settlement extinguished even the separate and unaccrued wrongful death action. Goodyear had released the railroad "'from any and all liability for all claims and demands for all damages resulting from the injuries received by me at the time and place above stated, including such injuries as may hereafter develop as well as those now apparent,'" and including "'resulting

death.'" *Id.* at 337. Because "'the gist and foundation of the right in all cases is the wrongful act,'" this Court held that "the settlement and release relieved the [railroad defendant] from all liability for damages consequent upon the injuries received by Goodyear and his death." *Id.* at 345.

Respondent tries to wriggle free from the holding of *Mellon* by characterizing mesothelioma as "a separate and distinct injury" from asbestosis. Opp. 7. This is a confusion of terms. Mesothelioma, and cancer generally, may indeed involve a "separate disease process" from asbestosis, *id.* 7 n.2, but that does not make cancer a separate "injury" as that term is used in tort law and in sections 1 and 9 of FELA. "Injury" is an "invasion of any legally protected interest." *Restatement (Second) Of Torts* § 7(1) (1965). Asbestos exposure is the invasion of the plaintiff's interest in bodily freedom from toxic agents, and this Court has held that this interest receives legal protection (*i.e.*, is actionable) when the exposed person manifests asbestos-related disease. *Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 427 (1997). The development of cancer is not a new "injury" under FELA, *i.e.*, there was no separate "invasion" by Norfolk Southern of any interest of the plaintiff at that time. Rather cancer is a consequential physical harm from the same wrongful act. *Restatement (Second)* § 7(2) (distinguishing "injury" from "harm," and defining the latter as "a loss or detriment in fact").

Mellon makes clear that a single "injury" may give rise to multiple harms and separate causes of action, but that does not affect the validity or force of a release. Death is a separate harm from the harms (physical and emotional) the decedent suffered while living. In authorizing wrongful death actions, Congress created "'distinct and independent liabilities'" from those that may be recovered through a direct action by the injured party. *Mellon*, 277 U.S. at 340 (quoting *Michigan Central R.R.* v. *Vreeland*, 227 U.S. 59, 65 (1913)). But those distinct liabilities nonetheless have "'the common foundation'" of "'the original wrongful injury to the

decedent,'" *id.* at 340-41 (quoting *Vreeland*, 227 U.S. at 65, 70), and therefore may be extinguished by release, *id.* at 345.

This same rule governs asbestos-cancer claims. Courts applying the two-action rule have recognized claims for mesothelioma and other cancer as "distinct and independent liabilities." See Pet. 15. But the judicially created two-action rule does not presuppose that cancer is a separate "injury." To the contrary, it recognizes that cancer flows from the same injury as asbestosis, which is why under traditional common law a plaintiff was required to seek damages for asbestosis and cancer in the same action. *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 119-20 (D.C. Cir. 1982) (Ginsburg, J.). Courts that have adopted the two-action rule have done so because they regarded the common law rule against claim-splitting as unfair to asbestos plaintiffs, given the long latency periods of asbestos-related cancer. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 174 (2003) (Kennedy, J., concurring in part and dissenting in part). But, given that mesothelioma claims, like the wrongful death claim at issue in *Mellon*, are founded on the "'same wrongful act'" (negligence resulting in injury), the plaintiff's express release of these distinct liabilities for cancer in settling his original claim must be upheld. Respondent – who fails even to address this analysis where set forth in the Petition (pp. 15-16) – is correct that "[i]n determining the right of a survival action, the emphasis should be on the injury." Opp. 6. But respondent fails to recognize that focus on the injury is fatal to her claim. Under *Mellon*, a general release extinguishes even unaccrued claims arising from the same wrongful act.

2. The same misconceptions plague respondent's analysis of *Callen*.[1] In *Callen*, this Court upheld against a section 5

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[1] Respondent also misstates the relevant holding of *Callen*. In an attempt to claim that *Callen* established no rule of law but only resolved factbound questions regarding a particular release, respondent argues that "if anything, *Callen* made clear only that the validity of the specific

challenge a general release for "'all claims and demands which [plaintiff] ha[s] or can or may have against [the railroad]'" arising out of the accident, 332 U.S. at 626-27, even though at the time the plaintiff executed the general release, he had not been diagnosed with, and was *unaware* that he had sustained, a permanent back injury. *Id.* at 627. Subsequently, when the plaintiff sought damages under FELA for a severe and permanent back injury, this Court upheld the general release:

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Id. at 631. The fact that the employee did not know he had a permanent back injury (just as Lester Anderson did not know of his cancer) was irrelevant to the validity of the release.

Callen cannot be reconciled with the state court's holding below that under the FELA "a release is valid only where it disposes of an accrued claim for a known injury," Pet. App. 12a. Respondent attempts to shield the lower court's holding by misconstruing *Callen*'s requirement that the release be in the context of a settlement ("[w]here controversies exist *as to whether there is liability.*" 332 U.S. at 631 (emphasis added)). According to respondent, FELA plaintiffs may release only claims for "existing *condition[s].*" Opp. 10. (emphasis added). *Callen* never says that; indeed as respondent concedes, the injury at issue in *Callen* was *unknown* at the time the release was executed. Opp. 8. More fundamentally,

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release at issue in that case was a question of fact for the jury." Opp. 9-10. That argument confuses two distinct holdings of *Callen.* The Court held that the question of whether the release was invalid because of mutual mistake was properly a question for the jury. 332 U.S. at 628-29. This Court resolved the separate question presented here – of whether section 5 of FELA forbade the general release – as a matter of law. *Id.* at 630-31.

the release executed by the Andersons in 1986, with the advice and consent of counsel, did resolve, fully and completely, the controversy of whether Anderson was injured by any wrongful act of asbestos exposure by the railroad. It matters not whether FELA allows one or two causes of actions to recover for that same wrongful act. "Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." *Callen*, 332 U.S. at 631.

Moreover, respondent (like the lower court) never squares the rule below with *Callen*'s holding that "until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others." *Id.* at 630. Respondent does not dispute that, outside of FELA, settlements with asbestos plaintiffs that release future cancer claims are perfectly valid, absent mutual mistake. The mutual-mistake doctrine only applies if there are "unknown injuries *that were not in the contemplation of the parties* when settlement was agreed upon." 66 Am. Jur. 2d *Release* § 21 (2001) (emphasis added); see also *id.* § 33 ("releases of rights which have not yet matured are valid and are self-operative, and they discharge the future rights or claims when they arise") (footnotes omitted); Michael A. DiSabatino, Annotation, *Modern Status of Rules as to Avoidance of Release of Personal Injury Claim on Ground of Mistake as to Nature and Extent of Injuries*, 13 A.L.R. 4th 686, 692 (1982) (for "belatedly appearing injuries, the outcome has tended to depend upon whether there was a sufficient indication of some significant injury prior to the release, so that the release could be said to be knowingly made"). There is no reason to have a different rule under FELA.

Despite respondent's unfounded protestations to the contrary, the ruling below, allowing both survival and wrongful-death actions to proceed even though they are predicated upon the same tortious conduct for which the

release was executed, is irreconcilable with *Callen* and *Mellon*, and should be reversed.

3. In siding with the Sixth Circuit to hold that FELA only permits general releases for "a known claim for a specific injury," *Babbitt* v. *Norfolk & Western Railway*, 104 F.3d 89, 93 (6th Cir. 1997), the decision below is in conflict with the rule of the Third and Eleventh Circuits (as well as other courts). Disavowing the *Babbitt* rule, those circuits hold that a FELA plaintiff may release future claims that expressly include "known risks even if there is no present manifestation of injury." *Wicker* v. *Consolidated Rail Corp.*, 142 F.3d 690, 701 (3d Cir. 1998); *Sea-Land Serv., Inc.* v. *Sellan*, 231 F.3d 848, 852 (11th Cir. 2000).

Respondent tries in vain to deny the circuit split, Opp. 11, 13, but her arguments founder on the express acknowledgement of that conflict by the court below (as well as by other courts, Pet. 17 n.7). The court below expressly stated that the *Babbitt* rule, which it adopted, departed from the rule of "the majority of courts." Pet. App. 13a. And, it specifically rejected *Wicker*'s "known-risk" rule, on which petitioner relied, because "[t]his is not the rule in the Sixth Circuit." *Id.* The court below properly understood its decision to side with the Sixth Circuit against the Third, and against other courts that follow *Wicker*.

Nonetheless, respondent attempts to whitewash the split by characterizing all issues related to FELA releases as "fact-bound" matters to which no "rigid set of rules" apply. Opp. 12. She bases that claim on a statement in *Wicker* that "'a release may be strong, but not conclusive evidence, of a parties' intent.'" *Id.* at 14 (emphasis in original omitted) (quoting *Wicker*, 142 F.3d at 701). But that passage in *Wicker* simply recognizes the well-established principle that parties can controvert the express language of a release on grounds of mutual mistake. 13 A.L.R.4th at 692 ("It has been widely held that the express language of the release is not conclusive, but rather that the courts will look to what was

actually within the contemplation of the parties at the time of the release in determining whether there was such a mistake as to justify avoidance.") (citation omitted). The question of whether a specific release is valid under a given rule may be fact-intensive. But the petition does not challenge any factbound application of an accepted rule. It challenges the rule of law that the court below (like the Sixth Circuit) has adopted in stark conflict with the majority rule.

The petition further demonstrates that Norfolk Southern would have prevailed under the *Wicker* rule. Pet. 20. The Andersons knew that, given Lester Anderson's asbestosis, he was at risk of contracting cancer; and with advice of counsel, they expressly released that claim for valuable consideration. *Id.* at 6-7, 20. Respondent answers with the *ipse dixit* that "[t]he result would have been the same under the *Wicker* 'approach,'" Opp. 16, but the only analysis she offers to support that implausible claim are quotations from the state court's application of the *Babbitt* rule. See *id.* at 15-16. Tellingly, the state court did not find the release invalid under *Wicker*; it expressly acknowledged that "Anderson may have been aware of the risk of developing mesothelioma as a result of his exposure to asbestos." Pet. App. 13a. The court simply found that analysis irrelevant because *Babbitt* permits releases only of accrued claims, not known risks: "because [Lester Anderson] did not have mesothelioma when he signed the release, his claim had not accrued and, therefore, he could not release it." *Id.*

Respondent also emphasizes the state court's disapproval of the blanket release of all employment-related claims in the first paragraph of the settlement agreement, Pet. App. 25a-26a. This argument is a red herring. In seeking this Court's review, petitioner does not rely on the first paragraph of the settlement agreement, but on the fifth paragraph that expressly releases asbestos-related claims (including mesothelioma and other cancers). See *id.* at 27a. This paragraph is a distinct and severable covenant. *Id.* ("IT IS

FURTHER AGREED AND UNDERSTOOD without any limitation on the foregoing"). Section 5 of FELA only voids a contract "to th[e] extent" it offends the prohibition on liability exemptions. 45 U.S.C. § 55. Thus, even if the covenant in the first paragraph were invalid – which it is not[2] – it would not affect the validity of the covenant in the fifth paragraph releasing mesothelioma and cancer claims.

In sum, this case cleanly presents a mature and acknowledged 2-1 split among the federal courts of appeals, with multiple state appellate courts on each side of the divide. This Court should resolve the conflict.

4. The petition demonstrates that the ability to negotiate comprehensive settlements of all asbestos-related liability (including claims for cancer that may manifest itself subsequently) is in the interests of FELA plaintiffs and defendants alike. It further demonstrates that the rule enforced below not only unfairly unsettles thousands of settlement agreements, but also injects uncertainty into the settlement process prospectively, which will only exacerbate the crowding of court dockets with "the elephantine mass of asbestos cases." *Ortiz* v. *Fireboard Corp.*, 527 U.S. 815, 821 (1999). See Pet. 21-24.

Respondent has no answer to any of this analysis. Respondent points out that only a "small percentage" of asbestos plaintiffs later contract mesothelioma. Opp. 17. But the rule adopted below does not *only apply* to claims involving mesothelioma. It casts a much broader net and would apply to any asbestos-related claim that can be the subject of a second action (including, most notably, the much

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[2] That recitation is perfectly legitimate in the context here (and in most asbestos cases, given that cancers often manifest themselves 30-40 years after exposure) where the plaintiff no longer works for the railroad. Anderson had not worked for the railroad for over 20 years when he brought his first claim, Pet. 5-6, and this paragraph prevents the regeneration of released claims in other guises.

more common claim that a plaintiff's lung cancer is exacerbated by asbestos exposure). Although precise numbers are not available, it is estimated that significantly more than 60,000 asbestos-related cancer claims have been filed to date nationally. See Stephen J. Carroll et al., RAND Inst. for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* 40, 46 (2002), *available at* http://www.rand.org/publications/DB/DB397/DB397.pdf. Indeed, the rule is not even asbestos-claim specific, and would apply in any occupational-exposure context to which courts may extend the two-action rule.

Moreover, it is not the filing of released cancer claims that will have the primary effect on court dockets; it will be the unwillingness of the parties to continue to settle nonmalignant asbestos claims, because railroads will not offer the same substantial consideration if future cancer claims cannot be released. Respondent does not deny the truth of this analysis, but disingenuously evades the question by faulting petitioner for not providing "evidence" to back up its analysis. Opp. 17. No such evidence is available; experienced plaintiff's counsel knows full well that railroads (including Norfolk Southern) keep settlement statistics confidential because disclosure compromises current negotiations over large blocks of cases. But suffice it to say that the total number of settlements are vast; it is Norfolk Southern's policy not to settle any asbestos claim without a cancer release; other railroads insist on such releases in all or some of their cases; and until this Court settles the circuit conflict, efficient settlement of asbestos claims is impossible. This Court should resolve this important and pressing conflict of authority now.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition should be granted.

Respectfully submitted,

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